IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER ST.NO.11708 OF 2007

Mahesh Nandlal Asrani ...Appellant
vs.
B.M.C. and others ...Respondents

Mr.M.P.Vashi for the Appellant
Ms Geeta Joglekar for B.M.C.
Mr.N.A.Ghag for Respondent No.4.

CORAM: A.S.OKA,J.
DATE : JUNE 5, 2007.

ORAL JUDGMENT:

1. Heard learned Advocate for the Appellant, the learned Advocate for the first Respondent and the learned Advocate for the fourth Respondent. It is not in dispute that the fourth Respondent has now stepped into the shoes of second and third Respondents. Hence, service of notice to the second and third Respondents is dispensed with. Considering the facts and circumstances of the case, Appeal is taken up for final disposal at admission stage.

2. The Appellant is the original Plaintiff who filed a suit for challenging the order passed under section 351 of the Mumbai Municipal Corporation Act,1888 by which the suit structure in possession of the Appellant was ordered to be demolished.

3. A Notice of Motion taken out by the Appellant has been dismissed by the Trial Court by accepting the finding recorded by the Assistant Commissioner of the first Respondent that the suit structure has been constructed in the year 1971. The Trial Court observed that the structure cannot be protected

unless it was shown that the structure was in existence on the datum line.

4. After having considered the submissions made by the Advocates for the parties and after considering the material on record, it appears that the order of the Assistant Commissioner of the first Respondent was passed on the basis of the stand taken by the second Respondent that the suit structure was in existence in the year 1971. The Appellant claims to have acquired the suit structure by an agreement dated 6th August 1987 from the second Respondent.

5. There is some material on record to show that there was a pending litigation between the Appellant and the second Respondent. This is not a case where even according to the stand taken by the contesting Respondents, structure has been recently constructed. Even according to their case, the structure was in existence in the year 1971. The action has been initiated against the Appellant in the year 2003. The Appellant is admittedly not the original owner of the structure. Whether the structure was in existence on the prescribed datum line or not is a matter of evidence. Since the material on record discloses that the action was initiated more than 30 years after the year 1971 when the structure was constructed according to the first Respondent, this is a case where the suit structure ought to have been protected till the final disposal of the suit.

6. In my view, considering the aforesaid facts, the learned

Trial Judge ought to have granted temporary injunction and expedited the hearing of the suit.

7. Hence, I pass the following order :

i) Impugned Judgment and Order dated 12th April 2007 is quashed and set aside.

ii) Notice of Motion No.4083 of 2004 is made absolute in terms of prayer clause (a) subject to condition that the Appellant will not carry out any additions or alterations to the suit structure till the final disposal of the suit without seeking permission of the Trial Court and will not part with possession thereof in favour of any third party.

iii) Hearing of the suit is expedited and the Trial Court is directed to decide the suit as expeditiously as possible and preferably on or before the end of April 2008.

iv) All contentions of the parties on merits of the suit are expressly kept open.

v) The suit will be decided without being influenced by the observations made in this order.

vi) Appeal is partly allowed in above terms with no order as to costs.

vii) Parties to act upon an authenticated copy of this order.

JUDGE